

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

August 14, 2018

Elisabeth A. Shumaker
Clerk of Court

DENNIS MARTIN,

Petitioner - Appellant,

v.

STATE OF OKLAHOMA; CARL BEAR,

Respondents - Appellees.

No. 18-6068
(D.C. No. 5:18-CV-00095-D)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BRISCOE, HOLMES, and MATHESON**, Circuit Judges.

Dennis Martin, an Oklahoma prisoner proceeding pro se,¹ seeks a certificate of appealability (“COA”) to appeal the district court’s dismissal of his application for federal habeas relief under 28 U.S.C. § 2241. 28 U.S.C. § 2253(c)(1)(A); *see Montez v. McKinna*, 208 F.3d 862, 867 (10th Cir. 2000) (holding “a state prisoner must obtain a COA to appeal the denial of a habeas petition” that “was filed pursuant to . . . § 2241”). Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA. We also deny Mr. Martin’s request to proceed *in forma pauperis* (“ifp”).

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ Because Mr. Martin is pro se, we liberally construe his filings but do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

I. BACKGROUND

Mr. Martin is serving a life sentence for his 1985 Oklahoma first degree murder conviction. *See Martin v. Bear*, 683 F. App'x 729, 730 (10th Cir. 2017) ("*Martin I*") (taking judicial notice of Mr. Martin's conviction). Mr. Martin has filed two previous applications under 28 U.S.C. § 2241. *See id.*; *Martin v. Bear*, 725 F. App'x 729 (10th Cir. 2018) ("*Martin II*"). Both times, the district court denied relief and we denied a COA. *Martin I* at 730; *Martin II* at 730-31.

Mr. Martin filed this § 2241 application in the United States District Court for the Western District of Arkansas, which transferred it to the District Court for the Western District of Oklahoma. Mr. Martin argued, as he had previously, that because his crime was committed by an Indian, against an Indian, and on Indian land, the Oklahoma state court that convicted and sentenced him lacked jurisdiction. He argued his confinement was therefore in violation of federal law.

The magistrate judge recommended dismissing Mr. Martin's petition because it did not establish a basis for habeas relief under § 2241. Mr. Martin objected to the magistrate judge's report and recommendation, but the district court overruled those objections and adopted the recommendation in full. The district court denied a COA.

II. DISCUSSION

To obtain a COA, Mr. Martin must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed

further,” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). We deny Mr. Martin’s request for a COA because reasonable jurists could not debate that he has failed to state a claim for relief under 28 U.S.C. § 2241.

We have told Mr. Martin twice before that § 2241 is not the appropriate avenue for this type of claim. *See Martin I* at 730; *Martin II* at 730. “A petition brought under 28 U.S.C. § 2241 typically attacks the execution of a sentence rather than its validity” *Brace v. United States*, 634 F.3d 1167, 1169 (10th Cir. 2011) (quotations omitted). A claim that a state prisoner’s conviction is invalid should be brought under 28 U.S.C. § 2254. *See Yellowbear v. Wyo. Attorney Gen.*, 525 F.3d 921, 924 (10th Cir. 2008). Mr. Martin’s attack on the state court’s jurisdiction challenges the validity of his conviction, not the execution of his sentence. *See id.* His assertion on appeal that he is “actually innocent,” Aplt. Br. at 4, also challenges his conviction. He therefore cannot obtain relief under § 2241.

Mr. Martin also argues on appeal that the district court violated due process when it denied him a hearing. We review the district court’s decision to grant or deny a hearing in a habeas proceeding for an abuse of discretion. *See Anderson v. Attorney Gen. of Kan.*, 425 F.3d 853, 858 (10th Cir. 2005). The district court did not abuse its discretion by denying Mr. Martin a hearing.

Because reasonable jurists could not debate whether Mr. Martin is entitled to relief under 28 U.S.C. § 2241, we deny a COA and dismiss this matter. We also deny his request to proceed *ifp* because Mr. Martin has not advanced a “reasoned,

nonfrivolous argument” on appeal, *see Lister v. Dep’t of the Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005).

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

DENNIS MARTIN,

Petitioner,

v.

OKLAHOMA, STATE OF, et al.,

Respondent(s).

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Case No. CIV-18-95-D

REPORT AND RECOMMENDATION

Petitioner, a federal prisoner appearing *pro se*, has filed an application (motion) for leave to proceed *in forma pauperis* and supporting affidavit (ECF No. 7). Pursuant to an order entered by United States District Judge Timothy DeGiusti, this matter has been referred to the undersigned magistrate judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). Having reviewed said motion, the undersigned finds that Petitioner has sufficient funds to prepay the filing fee of \$5.00. Specifically, the Petitioner attached an Inmate Statement reflecting account balance(s) totaling \$748.79. Because he does not qualify for authorization to proceed without prepayment of the filing fee, it is recommended that Petitioner's Motion (**ECF No. 7**) be **DENIED** and that he be ordered to prepay the full \$5.00 filing fee for this action to proceed. 28 U.S.C. § 1915(a)(1). *Lister v. Department of the Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005) (magistrate judge should issue a report and recommendation when denying motion to proceed *in forma pauperis*).

It is further recommended that this action be dismissed without prejudice to re-filing unless Petitioner pays the \$5.00 filing fee in full to the Clerk of the Court within twenty (20) days of any order adopting this Report and Recommendation.

Petitioner is advised that he may file an objection to this Report and Recommendation with the Clerk of this Court by **March 5, 2018**. Petitioner is further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of the factual and legal issues addressed herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

The Clerk is not to forward a copy of the petition to the appropriate state agency until further order of the Court.

This report and recommendation **terminates the referral** to the undersigned Magistrate Judge unless and until the matter is re-referred.

ENTERED on February 16, 2018.



SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

DENNIS MARTIN,

Petitioner,

v.

STATE OF OKLAHOMA, et al.,

Respondent.

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Case No. CIV-18-95-D

REPORT AND RECOMMENDATION

State prisoner Dennis Martin seeks a writ of habeas corpus under 28 U.S.C. § 2241. (ECF No. 1). United States District Judge Timothy D. DeGiusti has referred this matter to the undersigned magistrate judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B)-(C). The Court should summarily **DISMISS** the petition without prejudice.

I. SCREENING REQUIREMENT

The Court is required to review habeas petitions promptly and to “summarily dismiss [a] petition without ordering a responsive pleading,” *Mayle v. Felix*, 545 U.S. 644, 656 (2005), “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” See R. 4, R. Governing § 2254 Cases in U.S. Dist. Ct.¹

¹ The district court may apply any or all” of the Rules governing § 2254 cases to a habeas petition brought under § 2241. R. 1(b), R. Governing § 2254 Cases in U.S. Dist. Ct.

II. FACTUAL BACKGROUND AND PETITIONER'S CLAIMS

Petitioner informs the Court that he is confined at the Joseph Harp Correctional Center but he fails to identify anything else about his sentence(s). That is, the Court does not know when or where Petitioner was sentenced, or for what and for how long. *See* ECF No. 1:1.

In the Petition, Mr. Martin raises four grounds for relief, all of which essentially challenge his conviction on the basis that the state court lacked jurisdiction to convict him. In Ground One, Petitioner states that the federal court system has "exclusive jurisdiction over ALL crimes, committed by anyone, anywhere within the Indian nation, Indian country, or on Indian land or inside an Indian reservation." (ECF No. 1:7) (emphasis in original). Mr. Martin states that he "is Indian, was at all times on Cherokee Nation reservation land, inside Indian country." (ECF No. 1:7) (emphasis in original). As a result, Mr. Martin believes that his current detention in a state facility based on a state court conviction is in violation of federal law, presumably because he believes the state court lacked jurisdiction to render the conviction. (ECF No. 1:6).

In Ground Two, Petitioner essentially argues the same point raised in Ground One, stating that the Oklahoma state court system lacks jurisdiction "over Indians, Indian land, Indian County, Indian nations AND reservations." (ECF No. 1:7). In support of this argument, Petitioner reminds the Court that he is a Native American and "was at all times on Cherokee Nation reservation land, inside Indian country," presumably when he committed his crime. (ECF No. 1:7) (emphasis in original). In support of Ground Two,

Petitioner also argues that Oklahoma has discriminated against him by denying him access to the courts and suspending habeas corpus rights. (ECF No. 1:7).

The entirety of Ground Three states:

United-Nations-Resolutions, international law, well established federal law since 1866 Act of Congress-places this matter before this court. Research cannot find where Congress took the authority of this court over crimes committed inside the Cherokee, Creek, Seminole, Chocktaw [sic], and Chickasaw sovereign Indian nations, away, or transferred it to any other court, not even under this doctrine of immonent [sic] domain].

(ECF No. 1:7).

Finally, in Ground Four, Petitioner argues that the "failure of the United-States-Government to protect this Indians treaty, U.S. Constitution, rights under clearly established prior cases of this Court involving Indians warrants habeas relief." (ECF No. 1:8).

III. DISMISSAL

It is "the *nature* of a prisoner's confinement, not the *fact* of his confinement" that is the gravamen of a Section 2241 petition or challenge. *Prost v. Anderson*, 636 F.3d 578, 581 (10th Cir. 2011) (emphasis in original). Here, Mr. Martin alleges no facts to show that he is challenging the *execution* of his sentence or the nature of his confinement. He does not, for instance, seek to challenge "certain matters that occur at prison, such as deprivation of good-time credits and other prison disciplinary matters . . . affecting the fact or duration" of his custody. *Hale v. Fox*, 829 F.3d 1162, 1165 n.2 (10th Cir. 2016) (internal quotation omitted). Instead, Petitioner's Grounds for relief "attempt[] a frontal assault on his conviction." *Prost*, 636 F.3d at 581. For example, in Grounds One and Two, Mr. Martin repeatedly argues that the state court lacked jurisdiction to convict him; and

because he is Native American, and suggests that he committed his crime on “Indian land,” that “exclusive jurisdiction” would have been in a federal court. *See* ECF No. 1:6-7. While such attacks are proper in a Section 2254 action, *McIntosh v. U.S. Parole Comm’n*, 115 F.3d 809, 811 (10th Cir. 1997), they fail to establish a basis for habeas relief arising under Section 2241 because they do not attack the execution of Petitioner’s sentence. Therefore, the claims challenging jurisdiction in Grounds One and Two should be dismissed without prejudice. To the extent Petitioner desires to challenge the validity of his conviction, then he must file an action pursuant to Section 2254 utilizing the proper form. The Court, however, will not construe these claims as ones under Section 2254.²

In support of Ground Two, Petitioner also argues that Oklahoma has discriminated against him by denying him access to the courts, and suspending habeas corpus rights. (ECF No. 1:7). But these challenges are not cognizable on habeas review, as they involve direct challenges to Oklahoma state procedural rules and laws. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) “[F]ederal habeas corpus relief does not lie for errors of state law,” and “it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” (internal quotation marks omitted); *Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000) (“[Petitioner’s] claims of state law violations are not cognizable in a federal habeas action.”) (citing 28 U.S.C. §§ 2241(c)(3), 2254(a)); *Stryker v. Bear*, No. CIV-17-695-W, 2017 WL 4533968, at *3 (W.D. Okla. Sept. 5, 2017)

² The Court lacks sufficient information about Petitioner’s claims to know, for example, whether they have been exhausted in state court or if they are timely. As such, construing the Petition as arising under Section 2254 could have unintended consequences for Petitioner. *See, e.g., Davis v. Roberts*, 425 F.3d 830, 834-35 (10th Cir. 2005) (discussing unintended consequences of construing a petitioner’s habeas petition as arising under § 2254).

(unpublished report and recommendation) (finding that petitioner's claim that Oklahoma denied him "access to court, suspended habeas corpus, . . . and denied him equal protection and due process" did "not demonstrate any violation of federal law"), *adopted*, 2017 WL 4533138 (W.D. Okla. Oct. 10, 2017) (unpublished district court order). Therefore, to the extent that Petitioner directly challenges Oklahoma procedural rules and laws, the Court should dismiss the claims, without prejudice. *See Rael v. Williams*, 223 F.3d 1153, 1154–55 (10th Cir. 2000).

In Ground Three, Petitioner provides several bases to support Grounds One and Two, but does not appear to present any additional argument for relief. Therefore, the Court should also dismiss Ground Three in accordance with the reasoning outlined above regarding the dismissal of Grounds One and Two. *See supra*.

Finally, the Court should dismiss "Ground Four," as it fails to present any additional substantive argument and appears instead to be a restatement of Grounds One and Two and a plea for relief based on the facts as presented in those Grounds. (ECF No. 1:8).

IV. RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

Based upon the foregoing analysis, it is recommended that the petition be summarily dismissed, without prejudice.

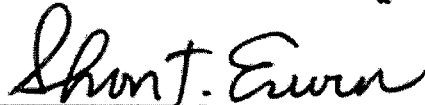
The parties are advised of their right to file an objection to this Report and Recommendation with the Clerk of this Court by **April 12, 2018**, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The parties are further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review

of both factual and legal issues contained herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

V. STATUS OF REFERRAL

This Report and Recommendation terminates the referral by the District Judge in this matter.

ENTERED on March 26, 2018.

A handwritten signature in black ink, reading "Shon T. Erwin", written over a horizontal line.

SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

DENNIS MARTIN,)	
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Petitioner,)	
)	
v.)	Case No. CIV-18-95-D
)	
STATE OF OKLAHOMA, <i>et al.</i> ,)	
)	
Respondents.)	

ORDER

This matter is before the Court for review of the Report and Recommendation [Doc. No. 13] issued by United States Magistrate Judge Shon T. Erwin pursuant to 28 U.S.C. § 636(b)(1)(B) and (C). Upon preliminary review of the Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241, Judge Erwin finds that the Petition should be summarily dismissed without prejudice because Petitioner fails to state a claim upon which relief can be granted under § 2241 and his pleading should not be recast as a § 2254 petition.

Within the time period to object, Petitioner has made a *pro se* filing, entitled “Motion for Hearing and Motion to Deny Report and Recommendation” [Doc. No. 14], which is construed as a timely objection. Thus, the Court must make a *de novo* determination of the portions of the Report to which a specific objection is made, and may accept, reject, or modify the recommended decision, in whole or in part. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

Petitioner objects to Judge Erwin’s conclusion that the Petition appears to challenge in all of Grounds One through Four, a state court conviction for which Petitioner is now

confined at Joseph Harp Correctional Center in Lexington, Oklahoma. Although Petitioner's arguments are not entirely clear, he states in highlighted text: "[T]here is no conviction in this case! None! No records of a crime, arrest, trial, or conviction! None! (proved in state courts)." See Obj. at 1 (emphasis in original). Taken in the context of the claims asserted in the Petition, the Court understands Petitioner's position is that state courts lacked jurisdiction over criminal charges against an Indian for an offense committed in Indian country. See *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *pet. cert. filed*, No. 17-1107 (Feb. 6, 2018).

Upon *de novo* consideration of the issues raised by Petitioner's Objection, the Court finds no viable basis to permit this habeas case to proceed under § 2241. Further, taking judicial notice of pertinent case files and records, the Court notes that Petitioner has previously attempted to obtain release from state custody by seeking relief under § 2241 on multiple occasions. See *Martin v. Bear*, Case No. CIV-15-682-D, Pet. (W.D. Okla. June 23, 2015); *Martin v. Bear*, Case No. CIV-16-1170-D, Pet. (W.D. Okla. Oct. 7, 2016); *Martin v. Bear*, Case No. CIV-17-1300-D, Pet. (W.D. Okla. Dec. 4, 2017). In fact, this is Petitioner's second case raising similar claims to the ones asserted in the instant Petition; the earlier case was summarily dismissed (as were prior cases) because "'§ 2241 is not an appropriate vehicle for relief.'" See *Martin v. Bear*, Case No. CIV-17-1300-D, Order at 1 (W.D. Okla. Jan. 23, 2018) (quoting *Martin v. Bear*, 683 F. App'x 729, 730 (10th Cir.), *cert. denied*, 138 S. Ct. 142 (2017) (unpublished)), *appeal pending*, No. 18-6017 (10th Cir.

Jan. 31, 2018).¹ Apparently seeking to avoid the same result, Petitioner filed this case in the United States District Court for the Western District of Arkansas, but it was promptly transferred to this district. *See* 1/30/18 Order [Doc. No. 2]. Petitioner cannot avoid the unfavorable rulings in prior cases by simply refileing another § 2241 case.

For these reasons, the Court fully concurs with Judge Erwin's findings that the Petition fails to state a claim cognizable under § 2241, and his recommendation for dismissal of the Petition without prejudice to a future action seeking an appropriate remedy.

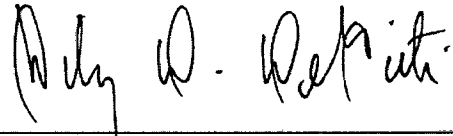
IT IS THEREFORE ORDERED that the Report and Recommendation [Doc. No. 13] is ADOPTED in its entirety. The Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241 is DISMISSED without prejudice to a future filing. Judgment shall be entered accordingly.

IT IS FURTHER ORDERED that pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a petitioner. A COA may issue only if Petitioner "has made a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the

¹ In Petitioner's 2016 case, the Tenth Circuit found that his denial of being "arrested, charged, tried, and convicted of a crime . . . is false," and took "judicial notice of his 1985 state court conviction for first degree murder and accompanying life sentence." *See Martin*, 683 F. App'x at 730 (citing *State v. Martin*, No. CRF-84-169 (Okla. 15th Jud. Dist. Ct. Apr. 25, 1985) (unpublished)).

petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Upon consideration, the Court finds the requisite standard is not met in this case. Therefore, a COA is DENIED.

IT IS SO ORDERED this 4th day of April, 2018.

A handwritten signature in black ink, reading "Timothy D. DeGiusti". The signature is written in a cursive, flowing style. The first name "Timothy" is written with a large, looped 'T'. The middle initial "D." is written with a large 'D' and a period. The last name "DeGiusti" is written with a large 'D' and a period, and the rest of the name in a cursive script.

TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE